PUBLIC PROSECUTOR

v.

PUTEH NORDIN ABD. RAHMAN & ANOR.

HIGH COURT MALAYA, IPOH
AJAIB SINGH J
[CRIMINAL TRIAL NO. 2 OF 1983]
22 MARCH 1983

CRIMINAL LAW AND PROCEDURE: *Trafficking - Cannabis - Statement made to detective police constable - Whether admissible under the Dangerous Drugs Act - Chemist's evidence - Question of weight of the cannabis - Whether the stalk, fibre and seed should be separated to ascertain true weight - Sentence - Mitigating factors.*

The two accused in this case were jointly charged with trafficking in a dangerous drug, to wit 2.87 kilograms of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The evidence against the 1st accused was that DPC Sivanesan met him at a pre-arranged place on the roadside to buy ganja from the 1st accused. The 2nd accused joined them a while later at the place on a motor cycle which had a large basket on its carrier. The 1st accused then walked over to a hut nearby and came back wheeling a bicycle with a bundle covered with a gunny sack on the carrier of the bicycle. The 1st accused removed the bundle and placed it in the basket which was on the 2nd accused's motor cycle and at the request of DPC Sivanesan the 2nd accused opened the bundle which was found to contain ganja. A police party which was keeping observation rushed up on receiving a pre-arranged signal from DPC Sivanesan and arrested both the accused. The bundle was sent to the Chemist who certified that it contained 2.87 kilograms of cannabis. In cross-examination DPC Sivanesan said "Man (2nd accused) told me I could contact him if I wanted drugs."

The 1st accused chose to remain silent when called for his defence but called the Chemist to give evidence in support and the Chemist confirmed that the contents of the bundle which she examined contained 2.87 kilograms of cannabis. She ascertained the weight of the cannabis by weighing the bundle and then deducting from this total weight the weight of the paper of the bundle and the strings with which it was tied. She said that she did not separate the stalk, fibre and seed when she weighted the cannabis plants to which Counsel for the 1st accused submitted that the Chemist should have excluded the stalk, the fibre and the seed before weighing. The 2nd accused was acquitted and discharged without his defence being called.

Held:

[1] The evidence against the 2nd accused was insufficient for a *prima facie* case to be established against him. There was also insufficient evidence to implicate him in this case as to his knowledge of the contents at least until such time as the bundle was opened as to his being in joint possession of the bundle which was subsequently found to contain ganja.

[2] The statement by the 2nd accused to DPC Sivanesan was inadmissible under s. 37A of the Dangerous Drugs Act as it was to an officer below the rank of an Inspector.

[3] Even if the statement had been made to a police officer of or above the rank of Inspector, this statement was insufficient to establish that the 2nd accused knew that the bundle contained ganja and to establish joint possession of the ganja as stated in the charge. The 2nd accused was accordingly acquitted and discharged without his defence being called.

[4] The Chemist was right in weighing the plants she found in the bundle without removing the stalk, fibre and seed.

[5] Under s. 37(da) of the Dangerous Drugs Act a presumption arose against the 1st accused that he was trafficking in cannabis because he was found in possession of more than 200 grams of the drug. As no attempt was made to rebut the presumption, the 1st accused was found guilty and convicted on the charge.

[6] As some of the mitigating factors were in favour of the accused, the Court did not sentence him to death but to life imprisonment plus six strokes of the rotan.

[1st accused found guilty, convicted & sentenced to life imprisonment. 2nd accused acquitted & discharged without defence being called.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A, 37(da), 39B(1)(a)

For the prosecution - Tee Hong Geok
For the 1st accused - Bakaruddin Sulaiman
For the 2nd accused - S. Theivanthiran (J.S. Olikh with him)

JUDGMENT

Ajaib Singh J:

The two accused in this case were jointly charged with trafficking in a dangerous drug under s. 39B(1) (a) of the Dangerous Drugs Act 1952. At the end of the prosecution case I acquitted and discharged the 2nd accused as I held that there was insufficient evidence to call for his defence. The 1st accused was called upon to make his defence and after the conclusion of the trial I found him guilty and sentenced him to life imprisonment plus six strokes of the rotan.

The evidence against the 1st accused was overwhelming for he was caught red-handed. The police had set up a trap and DPC Sivanesan met the 1st accused at a pre-arranged place on the roadside to buy ganja from the 1st accused. A short while later they were joined by the 2nd accused who turned up at the place on a motor cycle which had a large basket on its carrier. The 1st accused then walked over to a hut nearby and came back wheeling a bicycle and on the carrier of the bicycle was a bundle covered with a gunny sack. The 1st accused removed the bundle and placed it in the basket which was on the motor cycle. At the request of DPC Sivanesan the 2nd accused opened the bundle and DPC Sivanesan found it to contain ganja. DPC Sivanesan then gave a pre-arranged signal whereupon a police party which was keeping observation rushed up and arrested both the accused. The bundle was sent to the Chemist who certified that it contained 2.87 kilograms of cannabis.

The evidence against the 2nd accused was not strong enough for his defence to be called. He had joined the 1st accused and DPC Sivanesan just before the 1st accused left the place to bring the ganja. And at the request of DPC Sivanesan the 2nd accused opened the bundle to enable DPS Sivanesan to look at its contents. The bundle was placed in the basket by the 1st accused and there was no evidence that the 2nd accused knew that the bundle contained ganja. In my view the evidence against the 2nd accused was not strong enough for a *prima facie* case to be established against him. There was insufficient evidence to implicate him in this case as to his knowledge of the contents at least until such time as the bundle was opened and as to his being in joint possession of the bundle which was subsequently found to contain ganja.

In cross-examination DPC Sivanesan said "Man (2nd accused) told me I could contact him if I wanted drugs". I held this statement to be inadmissible under s. 37 A of the Dangerous Drugs Act as it was made to an officer below the rank of an Inspector. But even if this statement had been made to a police officer of or above the rank of Inspector, I still would have thought that this statement was insufficient to establish that the 2nd accused knew that the bundle contained ganja and to establish joint possession of the ganja as stated in the charge. I accordingly acquitted and discharged the 2nd accused without calling for his defence.

The 1st accused chose to remain silent but called the Chemist to give evidence in support. The Chemist said that she examined the contents of the bundle and found it to contain 2.87 kilograms of cannabis. She ascertained the weight of the cannabis by weighing the bundle and then deducting from this total weight the weight of the paper of the bundle and the strings with which it was tied. She said she weighed the cannabis plants without separating the stalk, fibre and seed as this was the proper procedure for ascertaining the true weight of the cannabis.

Learned Counsel for the 1st accused submitted that the weight of the ganja must be less than 2.87 kilograms because the chemist had weighed the contents of the bundle without separating the stalk, fibre and seed. The definition of cannabis in the Dangerous Drugs Act excludes the stalk the fibre and the seed and as such the chemist should have removed all these from the plant before weighing. This was not done and therefore the chemist had not ascertained the true weight of the cannabis.

I found no merit in this submission. Under the Dangerous Drugs Act

> cannabis (except in the expression cannabis resin) means any plant of the genus cannabis or any part of any such plant (by whatever name designated) but does not include cannabis resin or any of the following products after separation from the rest of the plant, namely -
>
> (a) mature stalk of any such plant;
>
> (b) fibre produced from mature stalk of any such plant; and
>
> (c) seed of any such plant;

This definition consists of two parts. The first part states that any plant of the genus cannabis or any part thereof is cannabis. This is a dangerous drug and trafficking in it is an offence under the Act. The second part in the definition of cannabis states that cannabis does not include cannabis resin and does not include certain products after these products have been separated from the cannabis plant namely mature stalk of the plant, fibre produced from the mature stalk of the plant and seed of the plant.

It will be seen therefore that any plant of the genus cannabis or any part thereof comes within the definition of cannabis as a dangerous drug together with its stalk its fibre and seed. All these constitute the plant. It is only when mature stalk and seed are separated that is to say removed from the cannabis plant that these products by themselves are excluded from the definition of cannabis as a dangerous drug. Also excluded is fibre produced from mature stalk of the plant. The Chemist was therefore right in weighing the plants she found in the bundle without removing the stalk, fibre and seed.

Under s. 37(da) of the Dangerous Drugs Act a presumption arose against the accused that he was trafficking in cannabis because he was found in possession of more than 200 grams of the drug. The accused made no attempt to rebut the presumption and he was therefore found guilty and convicted on the charge. On sentence I took into consideration some

mitigating factors in favour of the accused and did not sentence him to death but to the lesser punishment of life imprisonment plus six strokes of the rotan. The mitigating factors were that the accused was a first offender, had a wife and five children to support and that the drug found in his possession was less deleterious than morphine and heroin.

Also found at [1983] 1 CLJ 254